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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB SILVA,

Defendant and Appellant.

C043224

(Super. Ct. No. SP080354A)

A jury convicted defendant Jacob Silva of first degree murder (Pen. Code, §§ 187, 189)¹ and rape (§ 261, subd. (a)(2)) of his girlfriend Renee Ramos, and found true a special circumstance allegation that the killing occurred in the commission of rape (§ 190.2, subd. (a)(17)(C)). He was sentenced to state prison for life without the possibility of parole for the murder; an eight-year upper term was imposed for the rape, but stayed pursuant to section 654.

¹ Undesignated statutory references are to the Penal Code.

On appeal, defendant contends (1) the evidence is insufficient to support either the murder or the rape conviction, and (2) the trial court prejudicially abused its discretion when it admitted the testimony of Avelino Alvarez. We reject each contention and shall affirm the judgment.

FACTUAL BACKGROUND

Prosecution's Evidence

On June 5, 2000, workers at a Home Depot construction site discovered the body of 18-year-old Renee Ramos, defendant's girlfriend, covered with trash and debris. Ramos's jeans had been pulled down around her knees, her underwear was rolled down below her buttocks and pubic area, and her shirt and bra were pulled up around her neck. She had abrasions near her shoulder and on her back, pelvis, knees and legs. She also had contusions on her cheekbone and a black eye. There was blood on her nose, shoulder, shirt, jeans and panties; the panties also contained semen. Ramos was wearing three necklaces.

A standard sexual assault examination was performed on Ramos, which included collecting hair, taking vaginal swabs and attempting to gather intact sperm and DNA. Ramos had been dead two to five days, a period long enough to have destroyed sperm or any DNA because of "insect activity," namely, maggot growth from hatched fly eggs.

Defendant, Ty Lopes and Ray Goans had become suspects in the case. Sperm found on Ramos's panties matched defendant's blood profile. One of the hairs, though not a pubic hair, was

consistent with Ray Goans's body hair and, to a lesser extent, with that of Ty Lopes. None of the hairs collected matched those of defendant.

The cause of death was ligature and/or manual strangulation. There were three ligature bands on Ramos's neck, which could have resulted from someone standing behind her and choking her or holding her up "hangman style." Ramos was about 10 weeks pregnant.

Several witnesses testified to the stormy relationship between defendant and Ramos. In May 2000, Amber Davis saw Ramos with a black eye that Ramos said had been caused by defendant. While camping with defendant and Ramos about a month before Ramos's death, Brandi Scott witnessed defendant threaten to throw Ramos into an electric fence. Amy Tietjen saw defendant throw Ramos against a fence and throw a shoe at her, and another time Tietjen saw defendant grab Ramos by the face and turn her around.

Shortly after defendant was arrested, Derek Collins visited him in jail. Defendant told Collins that he was being charged with something he did not do. In a telephone conversation with Collins after defendant was arrested, defendant told Collins that he had "fucked up" by telling the police that he was at the party where Ramos was killed, but defendant did not say where the party had been held. Ramos had told Collins that she was thinking of ending her relationship with defendant but was afraid to do so because he might beat her.

Defendant told Sean Souza that Ramos was pregnant again,² that she wanted to keep the child but he did not, that he was "tired of the crap" and was going to "knock some sense into [Ramos]," and he made "reference to killing [Ramos] if she ke[pt] the kid."

Louis Sachse, defendant's friend, admitted he may have told Detective Joe Morgan that about three weeks before Ramos was murdered, he heard defendant say to her, "I'll kill you, bitch." However, Sachse now claimed this was not the truth and that Morgan had asked if that is what Sachse had heard.

Avelino Alvarez testified he spoke with defendant in December 1999 about Ramos having cheated on him. Defendant said Ramos was a "dirty slut," that he wanted to tie her up and put a sign on her that said "free pussy," and have men rape her.

Jesse Howlin testified he spoke with defendant during the week of June 1, 2000. Defendant told him that Ramos had been beaten to death and raped. Howlin thought defendant was joking.

Josh B., who was almost 15 years of age at the time of Ramos's killing and 17 years old at the time of trial, testified he was at the construction site of a new Home Depot for a late-night party around Memorial Day. There were about 20 people there, including defendant, Ramos, and Ty Lopes. Defendant and Ramos argued and he struck her in the face a couple of times.

² Ramos had an abortion on April 14, 2000.

Josh B. tried to intervene, but defendant shoved him, so Josh B. left. Josh B. did not see defendant strangle Ramos.

Josh B. admitted telling investigators that Lopes killed Ramos by strangling her and that defendant had watched. According to Josh B., defendant told him that he did not try to stop the murder because he was afraid of Lopes. Josh B. also admitted telling the police that prior to Lopes killing Ramos he saw defendant and Lopes "strangl[ing] [Ramos] with her own bra strap and then screw[ing] her and dump[ing] her." When defendant was strangling Ramos she was "kind of like standing and kneeling at the same time like she was kind of lingering about like that."

Josh B. claimed that statements he made or may have made to the police were lies and that he only made the statements because the police had threatened him. Josh B.'s sources for the lies were rumors and newspaper articles.

Sergeant Anthony Souza testified that on September 7, 2000, after having interviewed Josh B., the latter was taken to Home Depot where Josh B. pointed out the location where Ramos had been killed.

On September 18, Sergeant Souza again interviewed Josh B. At Josh B.'s request, the police took him to Ramos's gravesite. There, Josh B. said that he had been at the Home Depot site when Ramos was killed. Defendant got angry with Ramos and punched her in the face with his fists, knocking her unconscious. Defendant then dragged Ramos to where Lopes and Goans were, and

defendant began choking her with an item of clothing or a chain she had around her neck. Ramos was seated but hunched over and defendant was behind her "pulling straight back." Defendant choked her two to three minutes, her voice squeaked and then stopped. Defendant, Lopes and Goans then raped her. Lopes later choked Ramos, but he did it "hangman" style, lifting her upward until she went limp. Lopes and Goans carried Ramos's body a few feet and covered her with construction rubble. Josh B. was then taken to the police station where he gave a videotaped statement, which was shown to the jury.

At trial, Ryan K. admitted to having told Sergeant Souza that during a telephone conversation defendant made a statement that implicated defendant in Ramos's killing. However, Ryan K. now claimed that defendant had not actually made any such statements to him. Instead, Ryan K. was telling Souza what he had heard from others, including Josh B.

Sergeant Souza testified that on February 6, 2001, he spoke with Ryan K. at juvenile hall about Ramos's murder. Ryan K. told Souza that while he was visiting at Troy T.'s residence, Troy T. received a telephone call from defendant and Ryan K. asked to speak with defendant. Defendant told Ryan K. that he had gotten mad at Ramos because she had cheated on him; that he choked Ramos to the point of killing her; that Lopes and Goans then raped her; and that defendant had not intended to kill Ramos. Ryan K. also said that he was fearful of retaliation against his family if he was labeled a "snitch."

Troy T. testified that he did not know defendant, had never met defendant, had never spoken to defendant, and he could not identify him in court. Troy T. admitted telling Detective Kenneth Wells that defendant made statements to him implicating defendant in Ramos's murder. However, Troy T. now claimed these statements were all lies, and he had just made the story up.

Detective Wells interviewed Troy T. at juvenile hall on February 13, 2001. Troy T. initially denied having received a telephone call from defendant but eventually admitted that he had. During that telephone conversation, defendant told Troy T. that he had killed somebody and needed to go into hiding. Troy T. did not believe defendant and asked for details. Defendant said he was mad at Ramos for "fucking other dudes," and that to teach Ramos a lesson one of defendant's friends had suggested they get Ramos high and "fuck her." Troy T. was very concerned during the interview that if he told Wells about the telephone call, he would "get branded a snitch" and it would be a real problem for him.

Detective Morgan picked defendant up on June 6, 2000, and took him to the police station. Morgan told defendant that they were going to take a sexual assault kit from him, but prior to taking the kit, he was going to check defendant's fingernails. Morgan left the room, which was monitored, and watched as defendant began cleaning his fingernails by putting them "in his mouth."

Defense Evidence

Defendant testified, admitting having committed several acts of violence against Ramos throughout their relationship and of threatening to kill her "[p]robably once," but he was not "sure."

Defendant denied killing Ramos and claimed he did not know about the Home Depot party or her death until after he was arrested on June 6, 2000, and put in jail. The last time defendant saw Ramos alive was after he left her at Labor Ready, an employment agency, on May 29, 2000, around 7:30 a.m. He waited for her in a park until noon. When she failed to show he returned to Labor Ready, but she was no longer there. He hung around Labor Ready for a couple of hours and then went looking for her at various locations, all without success.

Defendant denied telling Alvino Alvarez that he wanted to put a "free pussy" sign on Ramos and have men rape her; he denied knowing Troy T. or having called him; he denied speaking with Ryan K. about Ramos; and he denied speaking with Derek Collins about his case.

Wilson Stewart, a private investigator, was told by Josh B. in December 2000 that Josh B. had lied to the police about seeing Ramos killed, and that Josh B. did so because the officers told him he could be put in jail for 25 years to life.

Josh B. made similar statements to Robert Remlinger, a deputy public defender who had represented Ty Lopes.³

Dr. Roger Katz, a licensed psychologist, for reasons unconnected with the present case, evaluated Josh B. in September 2000 with regard to why he was predisposed to lie. During the interview, Josh B. told Dr. Katz that Lopes and Goans killed Ramos, not defendant. Josh B. also said that he saw Ramos dead or unconscious and that he had seen defendant beat her.

Terry Silva, defendant's father, testified that he was with Derek Collins on two occasions when they visited defendant in jail. Silva and Collins took turns speaking to defendant via a telephone, and Silva never heard any discussion about defendant's case or defendant saying that he "fucked up" by telling the police he was at Home Depot. However, Silva admitted he could only hear one side of the conversation when Collins was using the phone.

DISCUSSION

I

Defendant contends the evidence is insufficient to support his convictions for either the rape or the murder of Ramos. We disagree.

³ Ty Lopes was convicted of Ramos's murder and sentenced to prison for life without the possibility of parole. All charges against Ray Goans were dismissed.

"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55.)

A. Sufficiency of the Evidence That Ramos Was Raped

Defendant argues that the evidence was insufficient to prove Ramos was, in fact, raped. This is so, he maintains, because of a "lack of any physical evidence of any sexual assault" and because "it is difficult to separate the truth of [the witnesses'] testimony from rumors or conjecture."

As to the purported lack of physical evidence of rape, Ramos had abrasions on her shoulder, back, pelvis, knees and legs as well as contusions on her cheekbone and a black eye. Her jeans were down to her knees, her panties were rolled down below her buttocks and pubic area, and her shirt and a bra were pulled up around her neck. There was blood on Ramos's nose and clothing. This evidence alone is highly suggestive, if not compelling, of a sexual assault.

Defendant points out that Ramos had no swelling or bruising or tearing in her genital or anal area, which would have been expected had she been "essentially 'gang raped' by several persons." However, the pathologist testified that it was not uncommon for women who were sexually active, which was clearly

the case with Ramos, not to experience such symptoms. Moreover, there was evidence that the sexual assaults were initiated after Ramos had been beaten unconscious by defendant and, therefore, she could not have incurred such injuries by resisting.

Defendant further notes that no intact sperm, seminal fluid or foreign DNA was found in Ramos's genital or anal area. The pathologist also testified such evidence would almost certainly have been destroyed because of the advanced insect activity, i.e., maggot growth from hatched fly eggs.

Clearly, there was substantial physical evidence that Ramos was raped. As to the difficulty in determining the credibility of the witnesses, this was, of course, the proper task of the jury. "'Although [an appellate court] must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Several witnesses testified to defendant's infliction of physical violence on Ramos during their relationship and defendant admitted the same in his testimony. Josh B. told the police that while at a party at the Home Depot construction site, he saw defendant beat Ramos into unconsciousness and saw defendant, followed by Lopes and Goans, have sexual intercourse with her while she was unconscious. Of no small import was Josh B.'s description of Ramos being strangled "hangman style," which

was the precise manner suggested by the pathologist as her cause of death. Ryan K. told the police that defendant admitted to him that he had choked Ramos, that Lopes and Goans had raped her, and that he (defendant) had not intended to kill her. Prior to Ramos's murder, defendant told Avelino Alvarez that he wanted to tie Ramos up, place a sign on her saying "free pussy," and let others rape her. Troy T. told the police that defendant told him that one of defendant's friends had suggested they get Ramos "high" and "fuck her," but since Ramos did not want sex with the others, they raped her. Detective Morgan testified that after he told defendant that they were going to take fingernail scrapings from him, Morgan left the room and, over the monitor, watched defendant clean his fingernails.

Although Josh B., Troy T. and Ryan K. recanted the truth of their statements made to the police, the officers who interviewed them testified that each had made clear that he was afraid of being labeled a snitch. Sorting out the truth from the various lies and inconsistencies of the witnesses was the task of the jury, and one that they obviously resolved adversely to defendant.

Consequently, from the foregoing evidence the jury could reasonably conclude that Ramos had been raped, and that defendant had either raped and/or aided and abetted others in her rape.

B. Sufficiency of the Evidence That Defendant Murdered Ramos

The prosecution's theory was that Ramos was killed on Monday, May 29, 2000. Defendant argues that the evidence is insufficient to support this theory because the pathologist testified that Ramos's death occurred from two to five days prior to the discovery of her body on June 5. Thus Ramos had to have been killed between Wednesday, May 31 and Saturday, June 3, a time when other witnesses testified defendant was out of town. The pathologist's testimony was not as limited as defendant asserts.

Dr. John Cooper, the forensic pathologist who performed the autopsy on Ramos, testified that Ramos was dead at least two or three days before the discovery of her body, and in his report he had given the range as two to five days. When asked about these estimates at trial, Cooper stated: "It depends very greatly -- and I'm not sure if everybody is aware of this, but I want to make you aware of it. [¶] *Based on an autopsy, it's very difficult to be precise at all about how long somebody has been dead. It's not a very good way to make a determination. We can give it a range. But it depends greatly on the environmental factors, the temperature, the humidity and so forth where the body is laying.*" (Italics added.)

Thus, while Dr. Cooper was opining that Ramos was dead two to five days prior to the discovery of her body, he was not setting that range as an absolute limit within which her death must have occurred.

Defendant also claims the evidence was insufficient because of an "absence of evidence that there had ever been a party at the Home Depot [site]." This is so, he argues, since construction workers who had been there for a week found no evidence of a party, no blood was found at the scene, and there was testimony that there was nighttime security at the site. The argument is not persuasive.

Lionel Lee, the project superintendent overseeing the Home Depot building site, testified that he started on the job site in January 2000. When asked about whether he "ever notice[d] . . . anything such as bottles or cans or anything of that sort [on the site]," Lee replied that even though the workers were "slobs" the "building was always very clean as far as -- I never noticed anybody hanging around leaving trash on the site." Given the workers' propensity for keeping the premises clean, it can reasonably be inferred that any evidence of a party would likely have been cleaned up during the week between the party and the discovery of Ramos's body.

Defendant impliedly argues that because there was a security guard assigned to the Home Depot site there could not have been a party there the evening of May 29, 2000. However, the only evidence regarding a security guard was the testimony of Lee, who stated that there was a security guard "there at nighttime." There was no evidence whether security was provided every evening, including weekends and holidays. Nor was there any evidence that a security guard was actually present at the

site the evening of May 29, a fact that could easily have been shown by site records or from testimony by the guard. Given this absence of evidence, the argument is entitled to little, if any, weight.

Defendant claims there was no "evidence of any blood at the [Home Depot] scene, which corroborated [Josh B.'s] claim that [Ramos] was beaten there." First, defendant fails to point to any evidence that Ramos's beating left blood at the scene. Moreover, given that the site was kept in a relatively clean state, it would not be unusual for any blood that might have been there to have been cleaned up during the week between Ramos's murder and the discovery of her body.

II

During trial, the court ruled admissible the proposed testimony of Avelino Alvarez that a few months before Ramos's murder defendant had told Alvarez that because Ramos had cheated on him when he was out of state, he wanted to tie her up and put a sign on her that said "free pussy" and have men rape her.⁴ Defendant advances various reasons why the admission of Alvarez's testimony was prejudicial error. We reject them all.

⁴ The court instructed the jury per CALJIC No. 2.71.7, regarding a defendant's preoffense statement, as follows: "Evidence has been received from which you may find that an oral statement of intent or motive was made by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide whether the statement was made by the defendant. Evidence of an oral statement ought to be viewed with caution."

Defendant claims the trial court should have excluded Alvarez's testimony because the acts of tying Ramos up and placing the sign on her never occurred. The admissibility of a defendant's preoffense statement of intent to do an act does not turn on whether the intent was put into effect precisely in the manner stated. Instead, admissibility turns on whether the jury could reasonably conclude from the statement that the defendant had an intent or plan to commit the act. (See *People v. Farmer* (1989) 47 Cal.3d 888, 919; *People v. Clem* (1980) 104 Cal.App.3d 337, 345.) Defendant's statement showed the act he contemplated was to have Ramos rendered helpless and gang raped. The manner employed here was sufficiently similar -- Ramos was rendered helpless by defendant's beating her unconscious. Defendant's raping her in front of Lopes and Goans and leaving her for them to rape was tantamount to his prior statement of placing a "free pussy" sign on her. Accordingly, the court properly admitted the statement.

Defendant argues that "if [Alvarez's] testimony was admitted as probative of [defendant's] intent to have [Ramos] raped by others, the prosecution certainly had other and less prejudicial testimony that served the same purpose," namely, Josh B.'s statements to the police that he witnessed Ramos being raped. First, defendant never presented this theory to the court; consequently, he may not advance it for the first time on appeal. (Evid. Code, § 354; *People v. Carrera* (1989) 49 Cal.3d 291, 324.) Most importantly, however, since Josh B.'s trial

testimony was that he did not witness the rapes, Alvarez's testimony that defendant wanted to have her raped was extremely probative as to Josh B.'s credibility in light of his inconsistent statements that he both did and did not witness the rapes. Hence, Alvarez's testimony was properly admitted.

Finally, defendant argues that if the purpose of Alvarez's testimony was to show that defendant was upset because Ramos had cheated on him, there were several other prosecution witnesses who could have established that fact. While Alvarez's testimony did show that defendant was upset with Ramos for cheating on him, that was not the primary purpose for which it was offered. It was offered to show that defendant, according to plan, did have Ramos rendered helpless and gang raped.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

DAVIS, J.